

MEMORANDUM

TO: North Dakota State Agencies

FROM: Douglas A. Bahr, Solicitor General

DATE: January 29, 2007

RE: "Litigation Holds" and Preservation of Evidence

This memo addresses the procedures for preserving documents, electronic information, and other materials that may constitute evidence in pending or "reasonably foreseeable" litigation. A "litigation hold" is the process of identifying and preserving such materials. A "litigation hold" impacts an agency's established records management plan, requiring certain documents and electronic information be retained for longer periods of time in an unaltered form. This could include, for example, a Word document being retained in its electronic form rather than simply the printed form.

This memo and the guidelines set forth herein should be followed, to the extent feasible, for agency information and materials stored or maintained on agency property and in remote, personal, or home locations and computers of agency employees, consultants, and contractors.

BACKGROUND

Recent developments in federal and state laws and rules have defined obligations to preserve documents, electronic information, and other materials when a party is involved in or reasonably foresees that it may become involved in litigation. The duty to preserve documents, whether in electronic or other formats, arises upon notice that litigation may be instituted. What constitutes notice that litigation may be instituted will depend on the circumstances. And the duty to preserve applies to email and other electronic documents to the same extent it applies to paper documents and files. The documents, electronic information, and other materials that are subject to preservation and disclosure – and that may become part of a litigation hold – include, but are not limited to, the following:

- Paper originals, copies, and drafts
- Word processing documents (all versions)
- Email and email attachments
- Calendars and planners
- Spreadsheets and databases
- Instant messages
- Network logs
- PowerPoint presentations
- Manuals, publications, bulletins, pamphlets
- Graphics files
- Voicemail
- Information put on an agency Website

IMPLEMENTATION

Once an agency is subject to or should reasonably foresee that it will become involved in litigation, it has an obligation to preserve relevant documents, electronic information, and other materials. The law provides for severe sanctions in the event that relevant documents are destroyed, significantly altered, or if a party otherwise fails to preserve the documentation, information, or other materials. These sanctions may be imposed against the agency or individual who destroys or significantly alters the documents. In addition to monetary sanctions, courts may impose evidentiary sanctions (such as issuing an order that certain facts are established against a party or refusing to allow a party to introduce certain evidence), or even dismiss all or part of the action or proceeding. To properly preserve relevant documents, the Office of Attorney General recommends your agency establish a procedure to preserve documents in situations where litigation against your agency is pending or reasonably foreseeable. The procedure could include the following:

1. If managers or supervisors become aware of potential or actual litigation, they should contact the assistant attorney general or special assistant attorney general assigned to the agency. If an assistant attorney general or special assistant attorney general is not assigned to your agency, managers or supervisors should contact the North Dakota Solicitor General (Director of Civil Litigation) at 701.328.3640.
2. A Destruction Hold Notice (attached) should be issued by the agency or its assigned assistant attorney general or special assistant attorney general based upon currently available information. This can be revised after steps 3 and 4 are completed if needed.
3. Appropriate agency personnel and the assistant attorney general or special assistant attorney general assigned to the agency, in conjunction with the North Dakota Solicitor General or the assistant attorney general designated to represent your agency in the litigation, will meet to determine whether a litigation hold should be implemented. "Appropriate agency personnel" includes the person or persons most knowledgeable about the relevant computer systems and network operations at the agency, the storage and retrieval of information, and procedures for backing up and archiving electronic information. Depending on the nature of the litigation and type of documents involved, it may be appropriate to invite the Director of the Information Technology Department (ITD) or his or her designee to the meeting.
4. If a decision is made to implement a litigation hold, the individuals at the meeting will determine the scope of the litigation hold and how best to implement the litigation hold. The individuals at the meeting will:
 - a. Identify the information, including electronically stored information, that may be relevant to the litigation.
 - b. Identify who may have the relevant documents, electronic information, or other materials in their possession.

- c. Identify all locations and storage media of such materials. With respect to electronic information, such locations may include:
- Desktop and laptop computers
 - Network servers
 - Email servers
 - Handheld devices (Cell phones, Blackberries, Palm Pilots)
 - Storage devices including CD's and ZIP drives
 - Offsite storage
 - Remote computers with network connections
 - CDs, DVDs, Memory Sticks, and other portable storage devices
- d. Identify how best to implement the litigation hold, including how to preserve electronic data. Implementation includes:
- i. Arranging for the appropriate individual (agency head, division director, the assigned assistant attorney general), to send a written notice to employees at all applicable organizational levels setting forth the documents and other materials as to which diligent efforts should be made to preserve and the method and places of preservation.
 - ii. Notifying the appropriate agency personnel of steps the agency needs to take to preserve electronic data, such as requesting segregation, removal, or exchange of computers or hard drives and the copying or cloning of drives.
 - iii. Notifying the Director of ITD, or his or her designee, of steps ITD needs to take to preserve electronic data, such as halting routine deletion of email, halting automatic updates or cleaning of computers, preserving backup tapes beyond the routine write-over cycle, or transferring certain electronic data to a dedicated server.
 - iv. Determining how to monitor compliance with the litigation hold notice by periodically checking back with affected management and staff.
 - v. Determining how to keep a written record of steps taken to preserve documents, electronic information, and other materials to demonstrate compliance with the duty to preserve potential evidence.
 - vi. If needed, determining who will assist in reviewing documents for production and assertion of privileges.
 - vii. Determining how affected staff will be notified when the litigation hold has been canceled or removed.